

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SPANCRETE NORTHEAST, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1980	:	
through August 31, 1984.	:	

Petitioner, Spancrete Northeast, Inc., South Bethlehem, New York 12161, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1980 through August 31, 1984 (File No. 802323).

On October 20, 1987 and October 28, 1987, respectively, petitioner and the Division of Taxation, through their duly authorized representatives, waived a hearing in the Division of Tax Appeals and agreed to submit the case for determination based on a stipulation of facts and on certain additional documents, with all briefs to be filed by May 3, 1988. After due consideration of the record, Arthur S. Bray, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether the Audit Division properly disallowed the exemptions from sales and use tax which petitioner claimed on its purchases of machinery, equipment and fuel pursuant to, respectively, Tax Law § 1115(a)(12) and (c) on the ground that the items were not used in the production of tangible personal property for sale.

FINDINGS OF FACT

1. On May 20, 1985, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner, Spancrete Northeast, Inc. The first notice assessed sales and use taxes for the period December 1, 1980 through May 31, 1984 in the amount of \$187,530.67, plus interest of \$67,879.92, for a total amount due of \$255,410.59. The second notice assessed sales and use taxes for the period June 1, 1984 through August 31, 1984 in the amount of \$10,524.45, plus interest of \$871.39, for a total amount due of \$11,395.84.

2. The notices issued by the Audit Division were based on the disallowance of the manufacturer's exemption which petitioner had claimed pursuant to Tax Law § 1115(a)(12) on its purchases of machinery and equipment. The Audit Division also disallowed an exemption which petitioner had claimed for purchases of fuel pursuant to Tax Law § 1115(c).

3. Upon the submission, the parties entered into a stipulation which provides, in part, as follows:

(a) During the periods at issue, petitioner was both a manufacturer and an installer of prestressed, precast concrete hollow core slabs, structured beams, columns, tees and panels

known in the industry as "Spancrete".

(b) Each of petitioner's plants consists of a large building with an enclosed gantry and beds 600 feet long. Reinforcing cables are strung the length of the beds and tensioned. Concrete is then poured for the entire length of the bed from the gantry. Once the concrete has cured, it is cut to lengths determined by customer specifications. Typical sections are 12 feet to 40 feet in length, weigh from 1 ton to 20 tons and are 4 inches, 6 inches or 8 inches thick.

(c) Spancrete Northeast manufactures and installs precast, prestressed concrete structural panels. Spancrete Northeast's manufacturing is done at three locations: the company's original plant in South Bethlehem, New York, established in 1963; a plant in Rochester, New York, established in 1970; and a third plant in Aurora, Ohio, established in 1971.

(d) Petitioner pays sales tax on the materials used in the production of the product known as Spancrete.

(e) The concrete panels that petitioner manufactures are manufactured pursuant to its customers' specifications.

(f) Petitioner has title to and possession of the completed manufactured product during the time the product remains in petitioner's stockyard.

(g) The purchaser, a general contractor, has title to and possession of the completed manufactured product once the product is delivered to the job site.

(h) Petitioner installs more than 90 percent of the concrete panels it manufactures. These installations are accomplished pursuant to petitioner's contractual obligations with the general contractor.

(i) Unrelated third parties install less than 10 percent of the concrete panels petitioner manufactures.

(j) After installation, the manufactured panels constitute capital improvements to real property.

(k) During the period in issue, all of the machinery, fuel and equipment at issue were purchased by petitioner for use in its manufacture and production of Spancrete.

4. Petitioner is in the business of manufacturing tangible personal property and the machinery, equipment and fuel were purchased by petitioner for use in the manufacture and production of tangible personal property.

5. Petitioner filed sales tax returns throughout the period in issue and paid sales tax on the materials used in the production of Spancrete.

6. In accordance with New York State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. It is noted that proposed findings of fact "3", "4" and "5" have been rejected as being unnecessary for the determination. Proposed findings of fact "14", "18" and "19" are rejected as being in the nature of conclusions of law.

CONCLUSIONS OF LAW

A. That Tax Law § 1115(a)(12) exempts from sales and use taxes receipts from the following:

"Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...for sale, by manufacturing...."

B. That Tax Law § 1115(c) provides as follows:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing...shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

C. That the foregoing sections of the Tax Law require that the machinery, equipment or fuel be used or consumed in the production of tangible personal property "for sale". The crux of the instant dispute concerns whether the Spancrete was manufactured for sale.

Petitioner relies upon the statutory definition of sale set forth in Tax Law § 1101(b)(5) to establish that a sale occurred. This section defines the term "sale", in pertinent part, as follows:

"Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor." (Emphasis added.)

Specifically, petitioner argues that its installation of the Spancrete constitutes a sale "in any manner or by any means whatsoever" within the meaning of Tax Law § 1101(b)(5).

D. That it is concluded that petitioner did not produce Spancrete for sale within the meaning of Tax Law §§ 1115(a)(12); (c) and 1101(b)(5). In *Matter of Midland Asphalt Corp. v. Chu* (136 AD2d 851, lv denied __ NY2d __ [September 13, 1988]), petitioner manufactured asphalt. Ninety percent of the asphalt produced was delivered and applied by petitioner to its customers' highways or other surfaces. The Court held that substantial evidence supported the Tax Commission's determination that petitioner was not entitled to an exemption for the equipment and electricity used to manufacture its product since "petitioner was manufacturing the asphalt for its contracting business and is not primarily in the business of selling the asphalt separately from the services it provides" (*id.* at 853). In *Matter of Southern Tier Iron Works v. Tully* (66 AD2d 921, lv denied 46 NY2d 713), the Appellate Division similarly concluded that a fabricator of structural steel was not entitled to an exemption from sales and use taxes on its purchases of machinery and equipment which it used in the fabrication process since petitioner contracted to both supply the steel beams and to erect the proposed structures on construction projects. Therefore, it was found that petitioner was fabricating steel for its own use and not "for sale" (*id.* at 922). The principle that may be gleaned from the foregoing cases is that machinery, equipment and fuel are not used in producing tangible personal property for sale when the tangible personal property is supplied as part of an

installation (see also, Matter of Lawrence Hunter, State Tax Commn., May 27, 1983). Since petitioner installs more than 90 percent of the Spancrete panels it manufactures, it must be concluded that the Audit Division properly disallowed the exemptions from sales and use tax which petitioner claimed on its purchases of machinery, equipment and fuel since the items were not used in the production of tangible personal property for sale. It is finally noted that petitioner's reliance on 20 NYCRR 541.11 is similarly misplaced since the Spancrete was not sold separately from the installation service. Therefore, the distinction that petitioner has attempted to draw between a manufacturer and a fabricator is of no consequence.

E. That the petition of Spancrete Northeast, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due issued May 20, 1985 are sustained.

DATED: Albany, New York

October 20, 1988

/s/ Arthur S.

Bray _____
ADMINISTRATIVE LAW JUDGE